

**Town of Georgetown -- Appeal
Department Order #13-09, Mandatory Shoreland Zoning Act**

Appeal by Town of Georgetown Exhibit D

- **Superior Court Decision & Order (08/06/07)**
 - **Michael Morse Affidavit (12/19/06)**

STATE OF MAINE
SAGadahoc, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-06-08

JODIE MOGER &
GLENN HARMON

Petitioners

v.

DECISION & ORDER

TOWN OF GEORGETOWN

Respondent

BEFORE THE COURT

Before the Court is Petitioners Jodi Moger and Glenn Harmon's ("Petitioners") appeal, pursuant to M.R. Civ. P. 80B, of a decision by the Town of Georgetown ("Town") Board of Appeals ("Board").

BACKGROUND

Petitioners acquired by deed from Thomas W. Coffey ("Coffey") a 28.5 acre lot of land located on Beaver Valley Road in Georgetown, Maine on June 6, 1996 ("Beaver Valley Property"). Prior to this transfer, on June 7, 1993 Coffey applied for and received State approval for a wastewater disposal design for the Beaver Valley Property ("1993 Wastewater Disposal Design").

On November 18, 1993, the Town enacted a new Shoreland Zoning Ordinance ("Ordinance") requiring, among other provisions, that all land subject to the Ordinance would be classified as falling within either a "General Development District," a "Resource Protection District," or a "Limited Residential-Recreational District." (Ordinance § 10.) In 1994, the Town properly

adopted a Shoreland Zoning Map ("1994 Map") showing which areas of the Town fell within each zoning district.

In 1997, Petitioners received permission to install a subsurface waste disposal system on the Beaver Valley Property ("1997 Wastewater Disposal Design"). The 1997 Wastewater Disposal Design was for a different location on the Beaver Valley Property than the 1993 Wastewater Disposal Design. Subsequently, Petitioners obtained a building permit ("1997 Building Permit") and constructed a residence on the Beaver Valley Property.

On December 12, 2002, Petitioners conveyed eleven acres of the Beaver Valley Property, including the portion containing their residence ("Smith Area"), to John J. Smith and Joyce L. Smith ("Smiths"). Petitioners retained for themselves the remaining undeveloped 18.5 acres of the Beaver Valley Property ("Remaining Area").

On April 17, 2006, Petitioners applied for a building permit with the Town Planning Board seeking permission to construct a residence on the Remaining Area. After public hearings, the Planning Board approved Petitioners' building permit.

The Smiths appealed this decision to the Board arguing that Petitioners' proposed placement of a driveway violated set back requirements and that the wastewater disposal system for the property was inappropriately designed. Following a public hearing, the Board voted on August 7, 2006 to overturn the Planning Board's decision and revoke Petitioners' building permit. In reaching this conclusion, the Board found that the Planning Board acted properly in concluding that the proposed driveway met set back requirements. That conclusion has not been appealed. The Board, however, found that the

Remaining Area is located in the Resource Protection District and that the Planning Board was wrong to exempt the Remaining Area from this district and the zoning requirements imposed by virtue of its location in that district based upon the permit granted for the 1993 Wastewater Disposal Design.

On August 28, 2006 Petitioners filed an Application for Reconsideration of the Decision with the Board. The Board voted to deny this application on September 5, 2006. On September 21, 2006 Petitioners timely filed this appeal.

DISCUSSION

I. Standard of Review

The court reviews a local board's decision for error of law, abuse of discretion, or findings not supported by substantial evidence in the record. *York v. Town of Ogunquit*, 2001 ME 53, ¶ 6, 769 A.2d 172, 175. Substantial evidence is evidence that is sufficient for a board to have reasonably found the facts as it did. *Ryan v. Town of Camden*, 582 A.2d 973, 975 (Me. 1990). The burden of persuasion is on the party challenging a board's decision to show that the evidence compels a different result. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (1996). The Court must not substitute its judgment for that of a board on factual questions. *Id.* Further, a board's decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it." *Id.*

In contrast to the deference afforded to factual determinations, a board's interpretation of a local ordinance is a question of law subject to de novo review. *Isis Dev., LLC v. Town of Wells*, 2003 ME 149, n.4, 836 A.2d 1285, 1286. In construing the language of an ordinance, the Court considers the objectives

sought to be obtained by the ordinance in the context of the structure of the ordinance as a whole. *Id.* ¶ 3, 836 A.2d at 1286.

II. Is Remaining Area in the Resource Protection District

A threshold question is whether the Board's finding that the Remaining area "is physically located within the boundaries of the Resource Protection District as shown on the Shoreland Zoning Maps of 1994 and 2002" is sustainable. (R. at Tab U, pg. 1.) One of the Board's conclusions of law was that "[t]he Planning Board would have acted properly in accepting the [1997 Wastewater Disposal Design] submitted with the application for [Petitioners' building permit], based upon the assumption that [the Remaining Area] was not in the Resource Protection District." (R. at Tab U, pg. 2.) Therefore, if the Board's decision that the Remaining Area is located in the Resource Protection District is unsupported by substantial evidence or based on an error of law, its revocation of Petitioners' building permit application must be overturned.

A. Was Beaver Valley Property in Resource Protection District at Outset

By its terms, the Ordinance became effective as of November 18, 1993, its date of enactment. *See* Ordinance § 4. As of that date, the Ordinance placed all shorelands in the Town, including the Beaver Valley Property, into one of three districts. Ordinance § 10. Petitioners argue that the language of the Ordinance, statutory requirements of Maine law and the 1994 Map all demonstrate that the Board was incorrect in deciding that the Beaver Valley Property, and as a result the Remaining Area, was located within the Resource Protection District.

1. Was the Beaver Valley Property a "Currently Developed" Area?

The section of the Ordinance describing criteria for including property within the Resource Protection District dictates that this district will include "[a]reas rated as 'moderate' or 'high' value . . . as shown on the Town of Georgetown Shoreland Zoning Map.¹" Ordinance § 9(B)(1). The Ordinance, however, excepts from inclusion in the Resource Protection District "areas which are currently developed" Ordinance § 9(B). Developed Areas, in turn, are defined as follows:

Those areas, as of the effective date of this amended Ordinance (18 November 1993), which: include the actual specific developed area such as an established principal structure and associated accessory structures (including driveways, gardens and mowed areas but not including any undeveloped areas that may be on the lot); areas already approved for subdivision, or development; or for which there is a valid State-approved wastewater disposal design.

Ordinance § 14(F)(10).

Assuming that the Beaver Valley Property otherwise meets the criteria for inclusion in the Resource Protection District, there remains the question of whether that property as a whole was nevertheless considered a "developed area" and therefore excepted from inclusion in the Resource Protection District as of the date of enactment of the Ordinance as urged by Petitioners or whether, as argued by the Town, only the "actual specific developed area" around the area approved for a wastewater drainfield under the 1993 Wastewater Disposal Design is not subject to that district's restrictions on construction.

From a plain reading of the Ordinance, it is evident that the entire Beaver Valley Property must have been excepted from inclusion in the Resource

¹ Petitioners concede that the Beaver Valley Property was classified a "moderate" or "high" value area on the relevant Shoreland Zoning Map. (Reply Br. at 9.)

Protection District at the time the Ordinance was enacted. Although the Town is correct that the "actual specific developed area" surrounding a structure is excepted from the Resource Protection District's restriction, that is just one portion of the definition of a developed area in the Ordinance. The next clause states that "areas already approved for subdivision, or development" are also considered currently developed areas. Further, the final clause in the definition includes areas "for which there is a valid State-approved wastewater disposal design." Quite simply, the definition for Developed Areas includes three separate ways in which an area may qualify. Only those areas that qualify as Developed Areas by virtue of containing a structure are subject to the "actual specific developed area" limitation language.²

2. The Map

Although the plain language of the Ordinance implies that the Beaver Valley Property could not be included in the Resource Protection District, the Town was required by law to adopt and incorporate as part of the Ordinance a zoning map. 30-A M.R.S.A. § 4352(3). As such, it is necessary to consider the zoning map together with the text of the Ordinance to determine whether analysis of the map leads to a different conclusion than the text of the Ordinance alone.

² Further, the language in parentheses following the first part of the definition of developed area making clear that undeveloped portions of a property beyond an existing structure are not excepted from the Resource Protection District reinforces the conclusion that the entire property for which an approved wastewater disposal design existed at the time of enactment of the Ordinance was to be removed from inclusion in that district. If the Ordinance's drafters had intended the meaning urged by the Town, it could have put language in parentheses after the final clause making clear that the exception for drainfields does not include any undeveloped areas that may be on the lot for which there is not an approved drainfield, or similar language.

As an initial matter, there is substantial disagreement regarding which zoning map is the operative one in this case. The Board's conclusions of law included a finding that "[t]he Town has a properly executed Shoreland Zoning Map dated 2002." (R. at Tab U, pg. 2.) Prior to amending a zoning map, however, a municipality must meet a number of requirements, including providing public notice of and a public hearing on the proposed change. 30-A M.R.S.A. § 4352(9). In the present case, there is no record evidence supporting the proposition that either of these requirement were satisfied in adopting the 2002 Zoning Map. As a result, it cannot be considered a valid part of the Ordinance. Neither party disputes that the 1994 Map was validly adopted as part of the Ordinance. Therefore, that map is operative here.

The 1994 Map contains a legend stating that "Moderate or High Value Areas" are colored yellow and areas in the Resource Protection District are denoted by a series of dots. By reference to a Town tax map, (R. at Tab F), it is possible to locate the Beaver Valley Property on the 1994 Map towards the upper left corner of that map. On the map, the interior of this property is colored yellow, while a ring of dots surrounds it.

The Town argues that all areas rated moderate or high value are by the terms of the Ordinance within the Resource Protection District, while Petitioners argue that only the areas marked on the map with dots are within the Resource Protection District. In attempting to harmonize the text of the Ordinance with what appears on the 1994 Map, however, it is evident that neither interpretation is sustainable.

The Ordinance states that "[t]he Resource Protection District includes the following areas when they occur within the limits of the shoreland zone, *except*

those areas which are currently developed." Ordinance § 9(B) (emphasis added). Among those areas included in the Resource Protection District are those "rated as 'moderate' or 'high' value by the Maine Department of Environmental Protection and the Maine Department of Inland Fisheries and Wildlife (MDIF&W) and as shown on the Town of Georgetown Shoreland Zoning Map." Ordinance § 9(B)(1). In reading these two Ordinance provisions together, it is clear that, contrary to Petitioners' assertion, all areas rated as moderate or high value are generally within the Resource Protection District. An important exception to this rule, however, is that the Ordinance states that all "areas which are currently developed" are not within the Resource Protection District, even if they otherwise meet the criteria for inclusion in that district. As discussed at length in Section II(A)(1) above, the entire Beaver Valley Property was a "currently developed" area at the time the Ordinance was enacted. The subsequent split of that property into the Smith Area and the Remaining Area did nothing to alter this status.

Viewing the 1994 Map in light of the text of the Ordinance further reinforces this conclusion. Specifically, there are no markings on the 1994 Map indicating in any way that there are currently developed areas excepted from inclusion in the Resource Protection District. By the Town's own argument, there was at least a small portion of the Beaver Valley Property that was excepted from the Resource Protection District as a currently developed area. The only conclusion to draw from this absence is that currently developed areas are not marked on the 1994 Map and that the absence of those markings has no significance for the determination of whether an area is considered to be currently developed within the meaning of the Ordinance. Because the plain

language of the Ordinance as reinforced by analyzing the 1994 Map leads to the conclusion that areas "currently developed" are not part of the Resource Protection District, and because the entire Beaver Valley Property is an area "currently developed" within the meaning of the Ordinance, the Remaining Area cannot be classified as part of the Resource Protection District. holding

CONCLUSION

The Board's decision should be VACATED and this case should be remanded back to the Board with instructions that Petitioners' Application be granted.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: 8/6/07


Joyce A. Wheeler, Justice

STATE OF MAINE
SAGADAHOC, ss.

SUPERIOR COURT
Civil Action
Docket No.: AP-06-08

JODI MOGER and GLENN HARMON,)	
)	
Plaintiffs)	
)	
v.)	AFFIDAVIT OF
)	MICHAEL MORSE OF THE
)	DEPARTMENT OF
TOWN OF GEORGETOWN,)	ENVIRONMENTAL PROTECTION
)	
Defendant)	
)	

I, Michael Morse, being first duly sworn, do hereby depose and state as follows:

1. I am the Assistant Shoreland Zoning Coordinator for the Southern Maine Regional Office of the Maine Department of Environmental Protection (the "Regional Unit"). The Regional Unit covers Georgetown, Maine. Shoreland zoning ordinances, including shoreland zoning maps, for the Town of Georgetown that have been approved by the Commissioner of the Maine Department of Environmental Protection are maintained in the Regional Unit's files.

2. The Commissioner of the Maine Department of Environmental Protection approved the 1994 Town of Georgetown, Maine Shoreland Zoning map, a true and accurate copy of which is attached hereto as Exhibit A (the "1994 Map").

3. After a thorough review of the Regional Unit's file for the Town of Georgetown, Maine, I found no documentation indicating that the Commissioner of the Maine Department of Environmental Protection has approved a Shoreland Zoning Map for the Town of Georgetown, Maine since it approved the 1994 Map.

4. The Regional Unit's file for the Town of Georgetown, Maine, contains draft copies of a Town of Georgetown Shoreland Zoning Map dated June 15, 2002. The Regional Unit's file contains no documentation to indicate that the Commissioner of the Maine Department of Environmental Protection has approved the June 15, 2002 Town of Georgetown Shoreland Zoning Map.

Dated: December 19, 2006


Michael Morse

STATE OF MAINE
SAGADAHOC, ss.

December 19, 2006

Personally appeared before me the above-named Michael Morse, and made oath that the foregoing statements by him made are true and correct to the best of his knowledge, information and belief.

Before me, 

DARLENE L. MURPHY
Notary Public

Printed Name: My Commission Expires September 26, 2007
Attorney at Law / Notary Public